APPENDIX

Page

A. Opinion of the Court of Appeals, March 4, 1982.... A-1

B. Order of the District Court, December 30, 1980..... A-18

C. Memorandum of the District Court, December 30, 1980. ..... A-19

D. Order and Judgment of the Court of Appeals, March 4, 1982. ..... A-25

E. Order of the Court of Appeals Denying Appellee's Petition for Rehearing..... A-26

F. Complaint. A-27

G. Amendment to the Complaint. A-35

H. Text of Constitutional Provision Relied On:

United States Constitution, First Amendment..... A-37

I. Text of Statutes Relied On:

Federal Power Act §205, 16 U.S.C., §824d (as in effect at time of filing of Complaint). A-38

Federal Power Act §206(a), 16 U.S.C. 824e(a)..... A-40

Sherman Act §1, 15 U.S.C. §1. ..... A-41

Sherman Act §2, 15 U.S.C. §2. ..... A-41

Clayton Act §2(a), as amended by Robinson-Patman Act, 15 U.S.C. §13(a). A-42

Clayton Act §4, 15 U.S.C. §15 (as in effect at time of filing of Complaint). A-43

Clayton Act §11(a), as amended, 15 U.S.C. §21(a). A-43

Missouri Revised Statutes. A-44

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1521

City of Kirkwood, a Municipal
Corporation,
Appellant,

v.

Union Electric Company, a
Corporation,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: November 10, 1981

Filed: March 4, 1982

Before HENLEY and ARNOLD, Circuit Judges, and NICHOL,* Senior District Judge.

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* The Hon. Fred J. Nichol, Senior United States District Judge for the District of South Dakota, sitting by designation.

ARNOLD, Circuit Judge.

The plaintiff, City of Kirkwood, Missouri (Kirkwood), appeals from the District Court's order granting summary judgment in this antitrust action to the defendant, Union Electric Company (UE). Kirkwood, which buys electricity from UE, alleges that UE violated the antitrust laws[1] primarily through creating and maintaining an anti-competitive "price squeeze." The principal issue on appeal is whether the District Court was correct in concluding that the alleged price squeeze is protected from antitrust attack by the exclusive jurisdiction of certain state and federal regulatory agencies, the filed-rate doctrine, the state-action doctrine, and the *Noerr-Pennington* doctrine. We do not agree that UE is immunized from antitrust liability by any of these doctrines, and therefore we reverse.

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[1] Specifically, Kirkwood alleges violations of §§1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2 (1976), and §2(a) of the Clayton Act, 15 U.S.C. §13(a) (1976), as amended by the Robinson-Patman Act. The statutes provide, in relevant part:

> Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, . . . is declared to be illegal. . . .

15 U.S.C. §1.

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, . . . shall be deemed guilty of a felony. . . .

15 U.S.C. §2.

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce,

I.

Kirkwood is a municipal corporation which sells electric power at retail to customers in approximately two-thirds of its geographical area. Kirkwood does not itself produce electricity, but instead buys it at wholesale from UE. UE is an electric utility which produces, transmits, and delivers electric power to both wholesale and retail customers in Missouri, Iowa, and Illinois. UE supplies all of Kirkwood's wholesale electric-power requirements and provides retail electric service to one-third of Kirkwood's area.[2]

UE's wholesale and retail rates are each subject to governmental regulation. Under the Federal Power Act, 16 U.S.C. §§824 *et seq.* (1974), the Federal Energy Regulatory Commission (FERC)[3] regulates wholesale sales of electric power in interstate commerce, such as the sales from UE to Kirkwood. The FERC is required to ensure that all rates and charges within its jurisdiction are just and reasonable. 16 U.S.C. §824d(a). When

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> where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . ..

15 U.S.C. §13(a).

[2] Kirkwood and UE each have exclusive retail electric distribution rights within their respective portions of the city. The ⅔-⅓ allocation of Kirkwood's area is provided for in Kirkwood's Wholesale Electric Service Agreement with UE.

[3] The Federal Power Commission (FPC) exercised regulatory control over utility rates prior to October 1, 1977, but as of that date its functions and responsibilities were transferred to the FERC and the Secretary of Energy.

a utility desires to increase (or decrease) its wholesale rates, it must file a proposed rate schedule with the FERC. Implementation of the increase may be suspended for up to seven months, 16 U.S.C. §824d(d), (e), but if the FERC delays action on a proposal for more than seven months, it automatically goes into effect, subject to refund if the FERC later determines the increase to be unlawful.

UE's retail rates are regulated by the Missouri Public Service Commission (PSC) pursuant to Mo. Ann. Stat. ch. 393 (Vernon 1975). Like the Federal Power Act, the Missouri statute prohibits rates which are unjust, unreasonable, unjustly discriminatory, or unduly preferential. Mo. Ann. Stat. §393.140(5). In Missouri, an increase in retail rates cannot go into effect until after the PSC approves it, but the PSC must act on rate applications no later than eleven months after filing. Mo. Ann. Stat. §393.150.

Kirkwood filed its complaint on September 1, 1977, alleging that UE violated the Sherman and Robinson-Patman Acts. Kirkwood charges that UE's wholesale rate increases in past years (particularly its 33.72% increase in 1975) in conjunction with its smaller and deferred increases in retail rates have created a "price squeeze" placing Kirkwood at a competitive disadvantage.[4] Because the wholesale rate Kirkwood paid to UE following these rate increases exceeded the retail rate paid by UE's large industrial primary service customers, Kirkwood asserts that it suffered competitive injury. Specifically, Kirkwood claims that it has been unable to attract large industrial customers to settle in its retail distributional area. In addition, Kirkwood complains that it has encountered increasing pressure to close down its electric power distribution operation and to sell or lease it to UE.

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[4] A price squeeze occurs when a vertically integrated company which has monopoly power at the wholesale level but faces competition at the retail level sets its wholesale rates so high that its wholesale customers will be unable to compete with it in the retail market. See *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 436-48 (2d Cir. 1945).

Aside from the price squeeze, Kirkwood contends UE committed several other antitrust violations, including price discrimination, maintenance of a territorial restriction, refusal to "wheel" power,[5] and refusal to set a transmission rate for Kirkwood.[6] In essence, Kirkwood's complaint charges that UE has a regional monopoly over the wholesale supply of electric power, and that UE has conspired with its affiliates primarily through the price-squeeze mechanism to eliminate the retail competition posed by small municipal utilities such as Kirkwood.

On January 23, 1978, the District Court granted UE's motion to dismiss Kirkwood's Robinson-Patman Act claim on the ground that electricity is not a commodity and that the complaint did not sufficiently allege sales occurring in interstate commerce. On July 24, 1980, Kirkwood asked the court to reconsider the dismissal, or in the alternative to allow Kirkwood to amend its complaint to correct its supposed defects. The court never ruled on Kirkwood's motion, but instead disposed of the entire matter on December 31, 1980, by granting UE's motion for summary judgment as to the entire complaint. This appeal followed.

II.

The District Court's order granting UE summary judgment treats Kirkwood's case as resting solely on its price-squeeze

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[5] "Wheeling" power refers to transmitting power sold by one utility to another over the lines of a third utility not involved in the sale.

[6] There is some dispute over whether any of the claims other than the price squeeze were adequately pleaded in Kirkwood's complaint. On remand, plaintiff should move for leave to amend its complaint to assert these claims clearly. "[L]eave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a).

allegation,[7] and indeed that is the principal basis of the complaint. The District Court decided that the price squeeze could not be the basis of antitrust liability for three reasons: (1) UE's wholesale and retail rates fall under the exclusive regulatory authority of federal and state agencies, and a court's award of antitrust damages for a price squeeze would conflict with the principle that no utility may deviate from its filed rates; (2) because UE's rates are subject to pervasive regulation, they fall within the state-action antitrust exemption; and (3) the First Amendment immunizes UE's actions in pertaining for rate increases. We respectfully disagree on each of these points.[8]

A. Exclusive Jurisdiction And The Filed-Rate Doctrine

The exclusive-jurisdiction argument rests on the idea that because regulatory commissions were created to monitor the reasonableness of utility rates, they alone should be responsible for remedying unjust and discriminatory rates. Under this

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[7] The opinion refers to the earlier dismissal of the Robinson-Patman Act claim, but does not mention any of the other alleged antitrust violations.

[8] Several other courts have recently considered price-squeeze cases. The two courts of appeals and two of the three district courts faced with the issue came to the same conclusion we do, namely that a municipality's price-squeeze claim is cognizable under the antitrust laws. *City of Groton* v. *Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981); *City of Mishawaka* v. *Indiana & Mich. Elec. Co. (Mishawaka I)*, 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978); *City of Mishawaka* v. *American Elec. Power Co. (Mishawaka II)*, 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981); *Borough of Ellwood City, Pennsylvania* v. *Pennsylvania Power Co.*, 462 F. Supp. 1343 (W.D. Pa. 1979); *City of Shakopee* v. *Northern States Power Co.*, Civ. No. 4-75-591 (D. Minn. Oct. 18, 1976). *Contra, City of Newark* v. *Delmarva Power & Light Co.*, 467 F. Supp. 763 (D. Del. 1979). For a law-review article considering the price-squeeze issue in depth, see Note, *The Applicability of Antitrust Laws to Price Squeezes in the Electric Utility industry*, 54 St. John's L. Rev. 103 (1979).

analysis, Kirkwood's sole avenue for challenging the price squeeze would be through participating in regulatory hearings on proposed rates, an avenue which has thus far yielded Kirkwood little relief.[9]

The Supreme Court has in the past held certain practices of highly regulated industries to be exempt from antitrust liability because of congressional intent, express or implied, that such industry-specific regulation supersede antitrust regulation for those industries. See, *e.g.*, *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963). The Federal Power Act does not contain an express antitrust exemption, but UE argues exemption should be implied from the pervasiveness of the regulatory scheme covering electric utilities. While it is true that the electric-power industry is subject to extensive government regulation, the Supreme Court has announced that "since our decision in *Otter Tail Power Co.* v. *United States*, [410 U.S. 366 (1973),] there can be no doubt about the proposition that the federal antitrust laws are applicable to electrical utilities." *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 596 n.35 (1976).[10]

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[9] Kirkwood has appeared before the FERC to challenge UE's proposed wholesale rate increases, to no avail. Moreover, once the FERC approves rate increases, it has no power to invalidate rates retroactively or order other relief if the rates are later found to be unreasonable. 16 U.S.C. §824d(e). In addition, FERC cannot remedy Kirkwood's problem on its own. Neither it nor the Missouri PSC has jurisdiction over the relationship as such between wholesale and retail rates. It is this relationship, rather than the unreasonableness of either the wholesale or the retail rate structure standing alone, that creates the problem of which Kirkwood complains.

[10] In *Otter Tail* the Supreme Court held a utility's refusal to wheel subject to antitrust challenge, and in *Cantor* the Court denied antitrust immunity to a utility which distributed "free" light bulbs to residential consumers. The plaintiff in *Cantor*, who sold light bulbs at retail, claimed that tying the distribution of a non-monopoly item (light bulbs) to a monopoly item (electricity) constituted illegal use of monopoly power to restrain competition. Although Detroit Edison's

As the *Cantor* opinion recognizes, past precedent cautions that the courts should be reluctant to imply antitrust immunity. See 428 U.S. at 597. "Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350-51 (1963) (footnotes omitted). Furthermore, " '[r]epeal is to be regarded as implied only if necessary to make [the regulatory statute] work, and even then only to the minimum extent necessary.' " *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659, 683 (1975) (quoting *Silver* v. *New York Stock Exchange, supra*, 373 U.S. at 357).[11]

The Supreme Court applied these principles to the electric-power industry in *Otter Tail* and in *Cantor* and concluded that the electric-utility regulatory scheme[12] and the antitrust laws are not "plainly repugnant" to one another. On the contrary, the regulatory and antitrust provisions are complementary to a degree. They share the common goal of eliminating unjust and discriminatory prices, though their ranges of authority and remedies differ. With respect to the case at bar, the FERC and PSC each has authority over only one end of the alleged price squeeze, while the antitrust laws can address the entire problem. In *FPC* v. *Conway Corp.*, 426 U.S. 271 (1976), the Supreme

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light-bulb-exchange program was part of an approved tariff and therefore could not be altered without the approval of the Michigan Public Service Commission, the Court refused to imply immunity on that basis.

[11] This Court recently summarized these and other implied-immunity cases in *Sound, Inc.* v. *American Tel. & Tel. Co.*, 631 F.2d 1324, 1327-31 (8th Cir. 1980) (no implied immunity for telecommunications industry under the Federal Communications Act of 1934).

[12] *Otter Tail* considered federal utility regulation, while *Cantor* was concerned with state regulation of electric utilities.

Court directed the FERC to consider potential anti-competitive effects of price squeezes when evaluating proposed wholesale-rate increases, but *Conway* does not hold that the FERC has exclusive jurisdiction over price squeezes.[13] Enforcing the antitrust laws is not the FERC's paramount objective, and the only remedy the FERC can grant is to reduce the wholesale price to the lower end of the "zone of reasonableness," 426 U.S. at 279 (quoting *Conway Corp.* v. *Federal Power Comm.*, 510 F.2d 1264, 1274 (D.C. Cir. 1975)), which, depending on where the retail price is set, may or may not be enough to eliminate a price squeeze. Prior to *Conway*, the FERC refused to take price squeezes into account because of its inability to control retail rates. *Conway* does not change the fact that neither the FERC nor the PSC can exercise jurisdiction over the entire price-squeeze situation.

We conclude that the FERC and PSC do not have exclusive jurisdiction over Kirkwood's price-squeeze claim. Nonetheless, UE asserts that even if the goals of the antitrust and utility regulatory schemes are complementary, the potential remedies conflict. According to UE, Kirkwood may not receive antitrust damages based on the price squeeze because such an award would contravene the filed-rate doctrine, which "forbids a regulated entity from charging rates for its services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co.* v. *Hall (Arkla)*, ___ U.S. ___, 101 S. Ct. 2925, 2930 (1981) (state court could not award damages in breach-of-contract action based on a rate never filed with the FERC).[14] This doctrine was applied in an

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[13] *See Mishawaka I*, 560 F.2d at 1319 ("Nothing in the Supreme Court's opinion in *Conway* suggests exclusive jurisdiction . . .").

[14] Although *Arkla* demonstrates the current vitality of the filed-rate doctrine, the case is clearly distinguishable from the facts of the instant case. In *Arkla*, the Supreme Court faced a conflict between state contract law and federal rate regulation and decided that the latter

antitrust context in *Keogh* v. *Chicago & Northwestern Railway*, 260 U.S. 156 (1922) (shipper could not recover antitrust damages based on illegal combination of carriers to fix rates where rates approved by ICC).

The filed-rate doctrine does not preclude antitrust liability in the case at bar. An award of antitrust damages for a price squeeze would not conflict with the doctrine's purpose, which is to ensure rate uniformity by confining the authority to oversee the reasonableness of rates to a single regulatory agency. See *Arkla*, 101 S. Ct. at 2930. In *Arkla*, the plaintiffs directly attacked rates which a regulatory agency had found to be reasonable, and the Supreme Court resolved the conflict in favor of the agency's determination of reasonableness. In contrast, Kirkwood does not quarrel with the reasonableness determinations of the FERC and PSC as to any individual wholesale or retail rate. Instead, Kirkwood complains of anti-competitive effects resulting from the interaction of rates which, taken separately, may be reasonable. As discussed above, neither the FERC nor the PSC has plenary authority over the interaction of wholesale and retail rates, because each commission can affect only one category of those rates. Thus, neither an award of antitrust damages nor the granting of properly conditioned injunctive relief for the price squeeze would interfere with either commission's regulatory authority. The Seventh Circuit adopted this analysis in *Mishawaka I:*

> If plaintiffs prove their case, instead of interfering with any rates approved by the Federal Power Commission, in addition to possible damages, the district court would

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preempted the former. "[U]nder the filed rate doctrine, when there is a conflict between the filed rate and the contract rate, the filed rate controls." 101 S. Ct. at 2933. Here we have a claimed conflict between federal rate regulation and federal antitrust regulation, and Supremacy Clause considerations do not come into play when a court balances competing federal rules.

> presumably order defendant to file a new wholesale rate application that would remove the disparity between the rates charged plaintiffs and defendant's industrial customers. The court would thus not be awarding a remedy that would "starkly conflict with the explicit statutory mandate of the Federal Power Commission * * * [or] improperly preemp[t] the jurisdiction of the Federal Power Commission * * *."
>
> . . . [I]t would not disrupt the regulatory process to award damages for any past anti-competitive conduct proved at trial.

560 F.2d at 1323-24 (quoting *Otter Tail*). In sum, the courts may consider a price-squeeze claim without infringing on the regulatory jurisdiction of the FERC and PSC, because the question is not whether the rates themselves are anti-competitive, but whether the defendant utility acted illegally in proposing a certain anti-competitive combination of rates.

Another consideration bolsters our conclusion that the filed-rate doctrine does not apply. The Third Circuit noted in *Essential Communications Systems, Inc.* v. *American Telephone & Telegraph Co.*, 610 F.2d 1114, 1121 (3d Cir. 1979) that the doctrine was created to protect customers, not competitors. "[T]he filed tariff rule has little or nothing to do with AT&T's duties under the antitrust laws toward its competitors . . .; competitors are not the intended beneficiaries of that rule of public utility regulation." See also *Litton Systems, Inc.* v. *American Telephone & Telegraph Co.*, 487 F. Supp. 942, 951 (S.D.N.Y. 1980). Kirkwood alleges that it has been injured as a competitor, not as a customer, though it stands in both relations to UE. A rule formulated to ensure uniformity of rates as between customers should not give an unfair advantage to a utility in its dealings with competitors.

B. State action

The District Court's second ground for granting summary judgment was that UE's wholesale and retail sales are immune to antitrust challenge under the state-action exemption articulated in *Parker* v. *Brown*, 317 U.S. 341 (1943). *Parker* involved an antitrust challenge to an agricultural marketing program in California which the state designed to stabilize market prices for commodities, including raisins. The Supreme Court held that Congress did not intend the Sherman Act "to restrain a state or its officers or agents from activities directed by its legislature." 317 U.S. at 350-51.

Subsequent cases interpreting *Parker* make clear that the state-action antitrust exemption does not encompass all action taken under color of state law. For example, in *Cantor* v. *Detroit Edison Co., supra*, the fact that the defendant utility's light-bulb-exchange program was contained in an approved tariff and therefore could not be continued without the regulatory commission's permission did not confer antitrust immunity on the utility. The Supreme Court found that Michigan's regulatory policy was neutral with regard to whether such a program should exist. Considering this regulatory neutrality in conjunction with the fact that Detroit Edison itself contributed substantially to the decision to adopt the program, the Supreme Court decided Detroit Edison should be held responsible for any resulting violation of the Sherman Act. "[N]otwithstanding the state participation in the decision, the private party exercised sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision." 428 U.S. at 593.

More recently, in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Supreme Court set forth two criteria for applying the state-action exemption. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the States

itself." 445 U.S. at 105 (quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (plurality opinion of Brennan, J.)). UE's alleged price squeeze does not satisfy either of the *Midcal* criteria.[15] First, while in *Midcal* the Court found an affirmative legislative policy to permit resale price maintenance (which was the challenged restraint), here the legislative policy does not authorize or encourage the challenged anti-competitive price squeeze. Instead, the FERC and PSC are both enjoined to seek out and eliminate discriminatory prices. Second, while UE's individual wholesale and retail rates are "actively supervised" by the FERC and PSC, Kirkwood challenges the interrelation of those rates, which is under the authority of neither Commission. Although under *Conway*, the FERC is supposed to consider price-squeeze claims, given its limited power and disposition[16] to remedy them, its consideration of such claims hardly amounts to "active supervision."

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[15] This Court in a recent review of the state-action doctrine concluded that the following factors are relevant to a determination of whether the exemption applies:

> the existence and nature of any relevant statutorily expressed policy; the nature of the regulatory agency's interpretation and application of its enabling statute, including the accommodation of competition by the regulator; the fairness of subjecting a regulated private defendant to the mandates of antitrust law; and the nature and extent of the state's interest in the specific subject matter of the challenged activity.

Sound, Inc. v. *American Tel. & Tel. Co.*, 631 F.2d at 1334. Because we find *Cantor* and *Midcal* to be dispositive on the issue, we do not go into all of these factors in detail.

[16] In the briefs filed by the FERC in relation to the petitions for certiorari in *Mishawaka I* and *Mishawaka II*, the FERC expressed its view that antitrust claims (such as price squeezes) can be more effectively and appropriately tried before the courts and thus should not be considered by regulatory commissions. See Brief for United States as *Amicus Curiae*, *Ind. & Mich. Elec. Co.* v. *City of Mishawaka*, 436 U.S. 922 (1978) at 10-11; Brief for the United States and the FERC as *Amicus Curiae*, *American Electric Power Co.* v. *City of Mishawaka*, 449 U.S. 1096 (1981) at 10.

C. Noerr-Pennington

The district court's third reason for granting UE summary judgment was that UE's activities in filing rate requests with the FERC and PSC are protected from antitrust liability by the First Amendment under *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965) (concerted efforts to influence public officials shielded from Sherman Act), and *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961) (Sherman Act does not prohibit attempts to influence passage or enforcement of laws). The *Noerr-Pennington* doctrine protects the First Amendment right to petition government authorities, but later cases demonstrate that the First Amendment does not immunize all attempts to manipulate the government for anti-competitive ends. See, *e.g., Cantor* v. *Detroit Edison Co., supra* (light-bulb-exchange program approved in tariff not immune to antitrust challenge); *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508 (1972) (attempt to monopolize transportation of goods by filing suits against aspiring competitors not immune from antitrust laws).

The facts in the instant case cannot be distinguished from those in *Cantor,* in which the Supreme Court held that "nothing in the *Noerr* opinion implies that the mere fact that a state regulatory agency may approve a proposal included in a tariff, and thereby require that the proposal be implemented until a revised tariff is filed and approved, is a sufficient reason for conferring antitrust immunity on the proposed conduct." 428 U.S. at 601-2. *Noerr* protects the right to make one's views known to the government, but *Cantor* and *Trucking Unlimited* make clear that the right may not be used as a pretext to achieve otherwise unlawful results. "If the end result is unlawful, it matters not that the means used in violation may be lawful." *Trucking Unlimited,* 404 U.S. at 515. The *Noerr-Pennington* doctrine will not protect a utility which manipulates the federal and state regulatory processes to achieve anti-competitive results. It is not for expression of opinion that Kirkwood seeks

to compel UE to respond in damages, but rather for UE's conduct in the market place.

D. Other issues

Kirkwood argues on appeal that it raised several other antitrust issues in its complaint which the District Court should have considered before granting summary judgment. These include a Robinson-Patman Act claim (which, as noted above, the District Court dismissed prior to granting the defendant summary judgment) and claims of refusal to wheel and of territorial restriction.

With respect to the Robinson-Patman Act claim, the District Court held that Kirkwood did not sufficiently allege that the challenged sales took place in interstate commerce. Kirkwood asked for leave to amend its complaint to correct the supposed deficiency, but the District Court never ruled on the request, probably because its other holding — that electricity is not a "commodity" — was sufficient to support dismissal of the Robinson-Patman claim.

The District Court also premised its dismissal of Kirkwood's Robinson-Patman Act claim on the proposition that "electric power is probably not considered a commodity" for Robinson-Patman purposes. *City of Kirkwood* v. *Union Electric Co.*, No. 77-947C(2) (E.D. Mo. Jan. 23, 1978) (memorandum accompanying order granting motion to dismiss in part). We disagree. Though the Robinson-Patman Act does not cover sales of real property,[17] intangibles, or services,[18] electricity does not fall into any of these categories. Electric power can be felt, if not

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[17] See *TV Signal Co.* v. *American Tel. & Tel. Co.*, 462 F.2d 1256, 1259 (8th Cir. 1972).

[18] See *Morning Pioneer, Inc.* v. *Bismarck Tribune Co.*, 493 F.2d 383, 389 n.11 (8th Cir.), *cert. denied*, 419 U.S. 836 (1974).

touched. It is produced, sold, stored in small quantities, transmitted, and distributed in discrete quantities.[19] We hold that electricity is a commodity for purposes of the Robinson-Patman Act. The antitrust laws should not be given a restrictive interpretation.

Because we are reversing and remanding on the price-squeeze and Robinson-Patman issues, we express no view on Kirkwood's other antitrust claims, which the District Court's opinion did not mention. The District Court should address these claims on remand.

Finally, UE argues that even if a price-squeeze claim (or, presumably, any of Kirkwood's other claims) is cognizable in antitrust, summary judgment was correctly granted because Kirkwood has failed to show either competitive injury or recoverable damages. This argument is premature. The District Court did not reach it. This case has not yet been tried, and on the state of the preliminary record before us[20] the issues of presence or extent of competition and damages cannot be conclusively determined as a matter of law.

III.

Kirkwood's price-squeeze complaint is not precluded by the exclusive-jurisdiction, filed-rate, state-action, or *Noerr-Pennington* doctrines. We conclude that Kirkwood has stated a

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[19] For a thorough analysis of the question, concluding that electric power does fall within the Robinson-Patman Act's coverage, see *City of Gainesville* v. *Fla. Power & Light Co.*, 488 F. Supp. 1258, 1279-83 (S.D. Fla. 1980). *Contra, City of Newark* v. *Delmarva Power & Light Co.*, 467 F. Supp. at 772-74.

[20] The record consists of discovery completed prior to the granting of summary judgment.

claim cognizable under the antitrust laws, though of course we express no views on the merits of that claim. The judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

It is so ordered.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 77-947 C (1)

City of Kirkwood,
Plaintiff,

vs.

Union Electric Company,
Defendant.

ORDER

In accordance with the Memorandum of this Court filed this date and incorporated herein,

IT IS HEREBY ORDERED that defendant's motion for summary judgment be and is GRANTED; and

IT IS FURTHER ORDERED that defendant shall have judgment against plaintiff on plaintiff's complaint.

Dated this 31st day of December, 1980.

/s/ H. Kenneth Wangelin
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 77-947 C (1)

City of Kirkwood,
Plaintiff,

vs.

Union Electric Company,
Defendant.

MEMORANDUM

This matter is before the Court upon defendant's motion for summary judgment. For the reasons stated below defendant's motion will be granted.

Plaintiff, City of Kirkwood, a municipal corporation, originally filed this cause on September 11, 1977 alleging that defendant, Union Electric Company, sold electricity to Kirkwood at a rate so high that Kirkwood could not compete for retail consumers of electricity. Plaintiff alleged that this conduct violated §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and § 2 of the Clayton Act as amended by the Robinson Patman Act, 15 U.S.C. § 13(a). The Court granted on June 23, 1978 defendant's motion to dismiss a subcount which alleged a violation of § 2 of the Clayton Act as amended by the Robinson Act, 15 U.S.C. § 13(a).

The following facts do not appear to be in dispute. The City of Kirkwood is a municipal corporation within the State of Missouri which, inter alia, operates its own electrical distribution system that provides electricity on a retail basis for approx-

imately two-thirds of the area of the city. Union Electric sells electricity at retail rate to the remaining approximate one-third of the City of Kirkwood. Union Electric has sold the City of Kirkwood electricity at wholesale prices, which the City of Kirkwood then distributes through its electrical distribution system. The regulation—the terms and the prices—of electricity provided by Union Electric are subject to regulation under The Federal Power Act, 16 U.S.C. § 824.[1]

The Federal Energy Regulatory Commission, which is limited to the regulation of the sale of electrical energy at wholesale prices in interstate commerce, prohibits discriminatory or preferential rates and also requires the setting of just and reasonable rates. 16 U.S.C. § 824d(a). Union Electric retails electricity throughout Missouri, and an area including the City of Kirkwood, subject to the regulation by the Missouri Public Service Commission, Chapters 389 and 393 RSMo 1969. The retail rates charged by Union Elecric are those allowed by order of the Missouri Public Service Commission, and such rates cannot be unreasonable, unjustly discriminatory or unduly preferential. Section 393.140 RSMo 1969.

Plaintiff alleges that:

> "[o]n September 13, 1975, defendant Company placed into effect against plaintiff a new 33.72 percent rate increase in the wholesale rate for electric power by means of a unilateral filing at the Federal Power Commission. At the same time, the defendant obtained no corresponding increase in its retail rates by appropriate action from the

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[1] Prior to October 1, 1977, The Federal Power Act was administered by The Federal Power Commission, after which time the functions and regulatory responsibilities were transferred to the Secretary of Energy and the Federal Energy Regulatory Commission. *See* The Department of Energy Organization Act, Pub.L. 95-91, 91 Stat. 565 (Aug. 4, 1977) and Executive Order 1009, 42 Fed. Reg. 46267 (Sept. 19, 1977).

> Missouri Public Service Commission. Subsequent to September 13, 1975, plaintiff paid approximately 35 percent more than Union was selling comparable power at retail to its large industrial primary service customers. The action by the defendant imposed a serious price squeeze upon the plaintiff."

In short, plaintiff alleges that defendant has engaged in a monopolization of interstate commerce of the distribution and sale of electric power at the retail level in violation of §§ 1 and 2 of the Sherman Act, by selling electricity to the City of Kirkwood at a rate greater than that sold by Union Electric to its large industrial customers.

Defendant moves for summary judgment pursuant to Rule 56 on this issue asserting three defenses: (1) that any remedy for damages resulting from a rate differential is not cognizable in an antitrust proceeding because such price differential is sanctioned by the Missouri Public Service Commission and the Federal Energy Regulatory Commission; (2) that the state action doctrine exempts these tariff rates from antitrust challenge; and (3) that the defendant is exempt from antitrust liability under the First Amendment and the Noerr-Pennington doctrine.

The gravamen of defendant's contention is that any damages allegedly suffered are not recoverable because the City of Kirkwood's action is really a dispute over the wholesale and retail rates charged by Union Electric for various customers, and the determinations of such are made by the Missouri Public Service Commission and/or Federal Energy Regulatory Commission. The City of Kirkwood as a potential customer had the right to intervene in both Federal Energy Regulatory Commission hearings, 18 C.F.R. § 1.8, as well as in the Missouri Public Service Commission retail hearings, § 393.260 RSMo 1979. The antitrust laws do not give a private cause of action for every alleged injury, but rather has dictated that in some instances the redress of wrongs shall be made by pursuing relief through ad-

ministrative proceedings of regulatory commissions. This Court is of the opinion that the City of Kirkwood's price squeeze contention is not a ground for recovery under antitrust laws. In *City of Newark* v. *DelMarva Power & Light Co.*, 467 F.Supp. 763, 769-70 (D.Del. 1979), a United States District Court held that:

> The Federal Power Act contemplates that the expert eye of the FPC will oversee the wholesale rates of public utilities in order to protect the public interest. That public interest involves not only the potential economic burden which the proposed rate will place on the public but also the potential of any rate to jeopardize the ability of a utility to continue its service. (footnote omitted).

Such rationale would appear to be equally applicable in the case at bar. The price squeeze alleged by plaintiff City of Kirkwood would not appear to be cognizable under the Sherman Antitrust Act. Because any alleged pecuniary loss results from the fine and collection of the rates authorized by the Missouri Public Service Commission or the Federal Energy Regulatory Commission, the City's exclusive remedy is with the public utility regulatory agencies. *See also City of Groton* v. *Connecticut Light and Power Co.* No. 15609 (D.Conn. August 27, 1980).

Both Union Electric's wholesale and retail rates are regulated by agencies of the federal and state governments, and therefore appear to be results of state action and so exempt from antitrust challenges. Union Electric's wholesale rates are set pursuant to the Federal Power Act, 16 U.S.C. §§ 824 et seq. Union Electric's Missouri retail rates are also regulated by a state actor—the Missouri Public Service Commission. Chapters 386 and 393 RSMo 1969. The Federal Power Act grants to the Federal Energy Regulatory Commission extensive control over all rates and charges made by a public utility in connection with the sale or transmission of electrical energy. The retail rates charged by Union Electric are also extensively regulated by the Missouri Public Service Commission. Such regulation consists

of, inter alia, the requirement that any time a utility files a new rule, regulation or practice relating to rates, there is to be a notice and a hearing concerning the propriety of such a rate. And, the Commission can and has suspended the operation and the deferment of such use for up to eleven months. The Public Service Commission sets the rate which Union Electric may charge for the sale of electricity on the retail level and Union Electric is bound by the rate which the Commission sets.

It has long been recognized that certain regulation is outside the reach of the antitrust laws under the "state action" exemption. *Parker* v. *Brown*, 317 U.S. 341 (1943). *Parker* v. *Brown* and subsequent cases dictate that there are two standards which must be met for antitrust immunity under *Parker* v. *Brown* to be satisfied. "First, the challenge restraint must be 'one clearly articulated and affirmatively expressed as a state policy'; second, the policy must be 'actively supervised by the state itself' ". *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). Both requirements are met in the case at bar. First, the Missouri Public Service Commisison and the Federal Energy Regulatory Commission rate regulations are clearly articulated and are affirmatively expressed as state/federal policy. In addition, this policy is actively supervised by the federal and Missouri regulatory bodies. Therefore, when Union Electric has conformed with the comprehensive substantive and procedural regulation of the state and federal bodies, it would be inappropriate to expose it to antitrust liability for such compliance.

Lastly, Union Electric's activities in the filing of tariffs with the Federal Energy Regulatory Council and the Missouri Public Service Commission and the collection of utility rates under orders promulgated from these administrative bodies are immune from antitrust liability under the First Amendment to the United States Constitution and the Noerr-Pennington doctrine. Other than an instance where a "sham exemption" applied, the

Noerr-Pennington doctrine (*United Mineworkers* v. *Pennington*, 381 U.S. 657 (1965) and *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), would appear to allow Union Electric to petition the various administrative bodies for rate changes. The same exemption bars utility petitioning of regulatory bodies when such complaint is frivolous, one intended merely to insure that the utility assesses rates without the beneficial overview of public utility regulatory commissions. The complaint filed by the plaintiff in this cause does not allege any such sham or frivolous action on Union Electric's part which would constitute an exception to the Noerr-Pennington doctrine. Therefore, there being no genuine issues of material fact, defendants are entitled to summary judgment as a matter of law, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Dated this 31st day of December, 1980.

/s/ H. Kenneth Wangelin
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1521

September Term, 1981

City of Kirkwood, a Municipal Corporation,
Appellant,

vs.

Union Electric Company, a corporation,
Appellee.

JUDGMENT

This appeal from the United States District Court for the Eastern District of Missouri was considered on a designated record from the United States District Court and on briefs of the respective parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, reversed.

And it is further ordered by this Court that this cause is remanded to the said District Court for proceedings consistent with this Court's opinion.

March 4, 1982

Robert D. St.Vrain
Clerk, U.S. Court of Appeals, 8th Circuit.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1521

September Term, 1981

City of Kirkwood, a Municipal Corporation,
Appellant,

vs.

Union Electric Company, a Corporation,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri

The Court, having considered appellee's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

March 31, 1982

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Civil Action No. 77-0947-C(2)

City of Kirkwood, 139 South Kirkwood Road
Kirkwood, Missouri 63122,
A Municipal Corporation of the State of Missouri,
Plaintiff,

v.

Union Electric Company,
A Corporation, c/o Registered Agent Stewart W. Smith
1901 Gratiot, St. Louis, Missouri 63166,
Defendant.

COMPLAINT

The City of Kirkwood, Missouri, a municipal corporation of the State of Missouri, plaintiff, by its attorneys, brings this action against the Union Electric Company, defendant, named herein (sometimes referred to as "Union" or "Company") and alleges as follows:

I.

JURISDICTION AND VENUE

1. This civil action is initiated by the City of Kirkwood, Missouri, a municipality that operates its own electric distribution system, against the electric power company that controls its supply of wholesale electric power and competes with it for retail sales. The plaintiff requests relief from the defendant's past and continuing violations of Sections 1 and 2 of the Sher-

man Act (15 U.S.C. §§ 1 and 2) and Section 2 of the Clayton Act (15 U.S.C. §13(a)). The remedy plaintiff seeks is declaratory and injunctive relief as well as treble damages.

2. This Court has jurisdiction of this case by virtue of Sections 4 and 16 of the Act of Congress of October 15, 1914, as amended (15 U.S.C. §§15, 26) commonly known as the Clayton Act. The defendant Company transacts business within the Eastern District of Missouri and the violations of law herein described are being carried out within the Eastern District of Missouri where the defendant has its principal offices, transacts business and is found.

II.

PARTIES

3. The plaintiff is a public agency organized and existing under the laws of the State of Missouri. The plaintiff owns and operates its electrical distribution system and distributes power at retail. Presently, the plaintiff buys all of its electric power requirements from defendant.

4. The defendant Union is incorporated under the laws of the State of Missouri and is doing business in Missouri in the area where plaintiff municipality is located. The defendant is a vertically integrated power company which generates, transmits and distributes electric power at wholesale for resale and at retail. The Company provides electric utility services in Missouri, Illinois and Iowa and owns a controlling interest in Missouri Edison Company, Missouri Power & Light Company, Missouri Utilities Company and the Union Colliery Company and a forty percent interest in Electric Energy, Inc.

III.

TRADE AND COMMERCE

5. The electric power industry is comprised generally of three functional levels; production, transmission and distribution. Production encompasses the conversion into electric power of energy obtained from the combustion of fossil fuels, from moving water or from atomic reaction. Transmission refers to the moving of electric energy by a high-voltage line from points where the energy is generated to distribution centers. Distribution involves the delivery and sale of electricity to the ultimate consumers.

6. Union is the largest electric utility in Missouri, and one of the largest in the United States, serving generally an area including the City of St. Louis and many counties in eastern Missouri. The Company's supply of electricity comes in large measure from generation sources owned by Union and its subsidiaries, as well as from interconnected operations with other power companies in other states.

7. The defendant Company is engaged in the business of transmitting and selling electric power at wholesale, and presently is the plaintiff's only outside source of supply for wholesale electric power.

8. The defendant Company dominates and controls the distribution and sale of retail elecric power within its area of operations, which includes approximately one-third of the City of Kirkwood and completely surrounds the small distribution area of the plaintiff.

9. The Company dominates and controls the facilities for the transmission of electric energy within its area of operations which the plaintiff is completely dependent upon for its supply of bulk power.

10. Union has entered into power purchase agreements and is a participant in pooling and other interconnection arrangements with its subsidiary companies and with other utility systems in the Midwestern state area including Missouri, Illinois, Iowa, through which power is both transmitted and received across state lines.

IV.

VIOLATIONS OF LAW

11. The defendant has monopolized and has attempted to monopolize interstate trade and commerce in the distribution and sale of electric power at retail, in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2), as follows:

A. On September 13, 1975, defendant Company placed into effect against plaintiff a new 33.72 percent rate increase in the wholesale rate for electric power by means of a unilateral filing at the Federal Power Commission. At the same time, the defendant obtained no corresponding increase in its retail rates by appropriate action before the Missouri Public Service Commission. Subsequent to September 13, 1975, plaintiff paid approximately 35 percent more than Union was selling comparable power at retail to its large industrial primary service customers. The action by the defendant imposed a serious price squeeze upon the plaintiff.

B. Defendant subsequently obtained increases in its retail rates before the Missouri Public Service Commission but the retail rates it put into effect were, on a comparable basis, below the wholesale rate put into effect on September 13, 1975, as well as the reduced wholesale rate (18.4% increase) put into effect on July 1, 1976, as a result of a settlement of Federal Power Commission proceedings. The defendant thus continues to impose a price squeeze upon the plaintiff.

C. The wholesale rate increase levied by defendant on plaintiff on September 13, 1975, was similar to the prior practice of the defendant in its previous wholesale rate filing whereby defendant set plaintiff's rates for wholesale power at a higher level and at an earlier time than the Company's rates charged to its retail customers and thereby imposed a price squeeze on plaintiff. The plaintiff has sought for many years by negotiations and proceedings before the Federal Power Commission unsuccessfully to have the discrimination eliminated. Any relief that the Federal Power Commission could grant will not provide an adequate remedy to plaintiff for the Company's anticompetitive activities in violation of the Federal antitrust laws.

D. The design of the wholesale rates put into effect by defendant precludes plaintiff from competing for classes of retail sales made by defendant.

E. The defendant Company's adoption of a wholesale rate to plaintiff which precludes the plaintiff from selling power to its customers at retail at the same rates charged by the Company at retail without impairing the traditional benefits derived by plaintiff from its municipality owned system has caused and threatens to cause the following consequences:

(1) The defendant Company has impaired the plaintiff's ability to compete against the defendant by depriving it of traditional benefits of municipal ownership;

(2) Defendant's action has caused the plaintiff to absorb the difference between the defendant's higher wholesale price and the defendant's lower retail prices, resulting in a loss of revenues and/or pressure on the citizens and officials of the municipality to discontinue operating the utility and to offer to sell or lease it to the defendant;

(3) Defendant's structure of its wholesale rate in relation to its retail rates precludes the plaintiff from competing for certain

classes of service such as industrial and electric heating, to the detriment of plaintiff.

F. The acts and practices of the defendant alleged herein have been done with the intent, and have had the effect of monopolizing the trade and commerce among the several states in the distribution and sale of electric power at retail and has injured the plaintiff municipality in its business and property. The plaintiff's losses are immediate, substantial and continuing.

12. Defendant has substantially lessened competition in violation of Section 2 of the Clayton Act (15 U.S.C. §13(a)) by doing, among other acts, the following:

A. Establishing its retail rates at such unreasonable and discriminatory levels in relationship to its comparable wholesale rates to municipalities that the plaintiff is unable to compete; and

B. See paragraph 11, *supra.*

V.

EFFECTS

13. The aforesaid violations have had among other things, the following effects:

A. Union has been able to impose unreasonable restraints on interstate trade and commerce in electric power in the service area of Union in Missouri;

B. Union has been able to preserve and expand a monopoly position in the interstate trade and commerce in electric power in the service area of Union in Missouri;

C. Union has been able to restrain competition in the retail, industrial and wholesale markets for electric energy in the service area of Union in Missouri;

D. Plaintiff is being denied benefit of lower cost power and an expanded revenue base which, but for the defendant's activities, would have been available to it;

E. Plaintiff is being denied revenues from the customers not served by reason of the acts of the defendant; and

F. Plaintiff has been and is being prevented from competing for and enjoying the benefits from obtaining a local electric power distribution system.

15. As the result of the above-described effect, the plaintiff has been damaged in an amount estimated at One Million Five Hundred Thousand Dollars ($1,500,000.00).

VI.

PRAYER FOR RELIEF

WHEREFORE, the plaintiff prays as follows:

A. The Court adjudge and decree that the defendant has imposed unreasonable restraints on trade and attempted to monopolize and monopolized interstate commerce and elected power in the State of Missouri in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2).

B. That the Court adjudge and decree that the defendant through discriminatory pricing practices substantially lessened or destroyed competition for retail customers and between public and private distribution systems in the State of Missouri in violation of Section 2 of the Clayton Act (15 U.S.C. §13(a)).

C. That as prescribed by Section 4 of the Clayton Act (15 U.S.C. §15), the plaintiff recover three-fold the $1,500,000.00 damages sustained by it as a result of the defendant's violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) and Section 2 of the Clayton Act (15 U.S.C. §13(a)) for a total of

Four Million Five Hundred Thousand Dollars ($4,500,000.00), plus attorneys' fees and costs.

D. That the defendant Union be permanently enjoined from engaging in, carrying out, or renewing any contracts, agreements, policies, practices, or understanding or claiming any rights thereunder having the purpose or effect of continuing, reviving or renewing the aforesaid violation of the Sherman and Clayton Acts or any contract, agreement, policy, practice, or understanding having like or similar purpose or effect, in accordance with the provisions of Sections 16 of the Clayton Act (15 U.S.C. §26).

F. That the plaintiff have such other and further relief as the nature of the case may require and the Court may deem just and proper.

Respectfully submitted,

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City Attorney - City of Kirkwood
Attorneys for Plaintiff.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

Civil Action
No. 77-0947-C(2)

City of Kirkwood
A Municipal Corporation Of The
State Of Missouri,
Plaintiff,

v.

Union Electric Company,
A Corporation,
Defendant.

THE PLAINTIFF'S AMENDMENTS TO ITS COMPLAINT

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, the Plaintiff seeks to amend without leave of the court by amending paragraph 11c to add the following as 11c(1):

On September 27, 1977, Defendant filed a proposed new wholesale rate, designated as Electric Tariff W-3 which will institute a new 39.75 percent increase in the wholesale rate for electric power by means of a unilateral filing at the Federal Power Commission. The Company has not provided for corresponding increases in the retail rates to its retail customers. The action by the Defendant will impose a new serious price squeeze upon the Plaintiff. In addition, the Defendant's filing of September 27, 1977 completely redesigned its wholesale rates so that the Plaintiff would be subject to an increase substantially in excess of that which would be incurred by Defendant's other wholesale customers.

Amend Paragraph 11c to add the following as 11c(2):

Union has combined and conspired with its affiliates that sell wholesale electric power to adopt wholesale rates that preclude the Plaintiff from selling power to its customers at retail at the same rates charged by the Defendant. This combination and conspiracy precludes the Plaintiff from competing for classes of retail sales made by the Defendant on an equal basis.

Amend by changing Paragraph 11F to 11G and inserting a new Paragraph 11F as follows:

Union has combined and conspired with its affiliates that purchase wholesale electric power from the Defendant to sell wholesale power to these affiliates at rates lower than those charged the Plaintiff by the Defendant. Union's price discrimination between the Defendant's wholesale affiliates and Kirkwood is done to the detriment of Kirkwood.

Respectfully submitted,

/s/ Charles F. Wheatley, Jr.
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/s/ Robert B. Hoemeke
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Attorneys for Plaintiff

November 21, 1977

APPENDIX H

TEXT OF CONSTITUTIONAL PROVISION RELIED ON

United States Constitution, First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX I

TEXT OF STATUTES RELIED ON

Federal Power Act §205, 16 U.S.C., §824d: (As In Effect At Time Of Filing Of Complaint)[1]

"§824d. Rates and charges; schedules; suspension of new rates.

"(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

"(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

"(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations af-

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[1]Amended November 9, 1978, Pub. L. 95-617, Title II, §§ 207(a), 208, 92 Stat. 3142; amendments not material to this action.

fecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

"(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

"(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the pro-

ceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible."

Federal Power Act §206(a); 16 U.S.C. 824e(a):

"§824e. Power of Commission to fix rates and charges; determination of cost of production or transmission.

"(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commision shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order."

Sherman Act §1, 15 U.S.C. §1:

§1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be beemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Sherman Act §2, 15 U.S.C. §2:

§2. Monopolizing trade a misdemeanor; penalty.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Clayton Act §2(a), As Amended By Robinson-Patman Act, 15 U.S.C. §13(a):

§ 13. Discrimination in price, services, or facilities—Price; selection of customers

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions

and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Clayton Act §4, 15 U.S.C. §15 (As In Effect At Time Of Filing Of Complaint):

"§15. Suits by persons injured; amount of recovery.

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Clayton Act §11(a), As Amended, 15 U.S.C. §21(a):

§ 21. Enforcement provisions—Commissions and Boards authorized to enforce compliance

(a) Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communiciations Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking

associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

MISSOURI REVISED STATUTES

Secton 393.130. Safe and adequate service—charges

1. Every gas corporation, every electrical corporation, every water corporation, and every sewer corporation shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such gas corporation, electrical corporation, water corporation or sewer corporation for gas, electricity, water, sewer or any service rendered or to be rendered shall be just and reasonable and not more than allowed by law or by order or decision of the commission. Every unjust or unreasonable charge made or demanded for gas, electricity, water, sewer or any such service, or in connection therewith, or in excess of that allowed by law or by order or decision of the commission is prohibited.

2. No gas corporation, electrical corporation, water corporation or sewer corporation shall directly or indirectly by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for gas, electricity, water, sewer or for any service rendered or to be rendered or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.

3. No gas corporation, electrical corporation, water corporation or sewer corporation shall make or grant any undue or unreasonable preference or advantage to any person, corpora-

tion or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . .

Section 393.140. General powers of commission in respect to gas, water, electricity and sewer services

The commission shall: (1) Have general supervision of all gas corporations, electrical corporations, water corporations and sewer corporations having authority under any special or general law or under any charter or franchise to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality, for the purpose of furnishing or distributing water or gas or of furnishing or transmitting electricity for light, heat or power, or maintaining underground conduits or ducts for electrical conductors, or for the purpose of collecting, carrying, treating, or disposing of sewage, and all gas plants, electric plants, water systems and sewer systems owned, leased or operated by any gas corporation, electrical corporation, water corporation, or sewer corporation.

(5) Examine all persons and corporations under its supervision and keep informed as to the methods, practices, regulations and property employed by them in the transaction of their business. Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges or the acts or regulations of any such persons or corporations are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished, notwithstanding that a higher rate or charge has heretofore been authorized by statute, and the just and reasonable acts and regulations to be

done and observed; and whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaints, that the property, equipment or appliances of any such person or corporation are unsafe, insufficient or inadequate, the commission shall determine and prescribe the safe, efficient and adequate property, equipment and appliances thereafter to be used, maintained and operated for the security and accommodation of the public and in compliance with the provisions of law and of their franchises and charters.

(11) Have power to require every gas corporation, electrical corporation, water corporation, and sewer corporation to file with the commission and to print and keep open to public inspection schedules showing all rates and charges made, established or enforced or to be charged or enforced, all forms of contract or agreement and all rules and regulations relating to rates, charges or service used or to be used, and all general privileges and facilities granted or allowed by such gas corporation, electrical corporation, water corporation, or sewer corporation; but this subdivision shall not apply to state, municipal or federal contracts. Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement, or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published by a gas corporation, electrical corporation, water corporation, or sewer corporation in compliance with an order or decision of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe. No corporation shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates

and charges applicable to such services as specified in its schedule filed and in effect at the time; nor shall any corporation refund or remit in any manner or by any device any portion of the rates or charges so specified, nor to extend to any person or corporation any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons and corporations under like circumstances. The commission shall have power to prescribe the form of every such schedule, and from time to time prescribe by order such changes in the form thereof as may be deemed wise. The commission shall also have power to establish such rules and regulations, to carry into effect the provisions of this subdivision, as it may deem necessary, and to modify and amend such rules or regulations from time to time.

393.150. Commission may fix rates after hearing—stay increase—burden of proof

1. Whenever there shall be filed with the commission by any gas corporation, electrical corporation, water corporation or sewer corporation any schedule stating a new rate or charge, or any new form of contract or agreement, or any new rule, regulation or practice relating to any rate, charge or service or to any general privilege or facility, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested gas corporation, electrical corporation, water corporation or sewer corporation, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge, form of contract or agreement, rule, regulation or practice, and pending such hearing and the decision thereon, the commission upon filing with such schedule, and delivering to the gas corporation, electrical corporation, water corporation or sewer corporation affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, form of contract or agree-

ment, rule, regulation or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, charge, form of contract or agreement, rule, regulation or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, form of contract or agreement, rule, regulation or practice goes into effect, the commission may make such order in reference to such rate, charge, form of contract or agreement, rule, regulation or practice as would be proper in a proceeding initiated after the rate, charge, form of contract or agreement, rule, regulation or practice had become effective.

2. If any such hearing cannot be concluded within the period of suspension, as above stated, the commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. At any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the gas corporation, electrical corporation, water corporation or sewer corporation, and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

393.260. Complaints as to quality and price of gas, water, electricity and sewer service—investigation by commission—form of complaints

1. Upon the complaint in writing of the mayor or the president or chairman of the board of aldermen, or a majority of the council, commission or other legislative body of any city, town, village or county within which the alleged violation occurred, or by not less than twenty-five consumers or purchasers, or prospective consumers or purchasers of such gas, electricity, water or sewer, as to the illuminating power, purity, pressure or price of gas, the efficiency of the electric incandescent lamp supply, the voltage of the current supplied for light, heat or power, or price

of electricity sold and delivered in such municipality, or the purity, pressure or price of water or the adequacy, sanitation or price of sewer service, the commission shall investigate as to the cause of such complaint.

2. When such complaint is made, the commission may, by its agents, examiners and inspectors, inspect the works, system, plant, devices, appliances and methods used by such person or corporation in manufacturing, transmitting and supplying such gas, electricity or water or furnishing said sewer service, and may examine or cause to be examined the books and papers of such person or corporation pertaining to the manufacture, sale, transmitting and supplying of such gas, electricity or water or furnishing of such sewer service. . . .

393.270. Notice and hearing—order fixing price of gas, water, electricity or sewer service, or requiring improvement

1. Before proceeding under a complaint presented as provided in sections 393.110 to 393.285, the commission shall cause notice of such complaint, and the purpose thereof, to be served upon the person or corporation affected thereby. Such person or corporation shall have an opportunity to be heard in respect to the matters complained of at a time and place to be specified in such notice. An investigation may be instituted by the commission as to any matter of which complaint may be made as provided in sections 393.110 to 393.285, or to enable it to ascertain the facts requisite to the exercise of any power conferred upon it.

2. After a hearing and after such investigation as shall have been made by the commission or its officers, agents, examiners or inspectors, the commission, within lawful limits may, by order, fix the maximum price of gas, electricity, water or sewer service not exceeding that fixed by statute to be charged by such corporation or person, for the service to be furnished; and may order such improvement in the manufacture, distribution or

supply of gas, in the manufacture, transmission or supply of electricity, in the distribution or supply of electricity, in the distribution or supply of water, in the collection, carriage, treatment and disposal of sewage, or in the methods employed by such persons or corporation as will in its judgment be adequate, just and reasonable.

3. The price fixed by the commission under sections 393.110 to 393.285 shall be the maximum price to be charged by such corporation or person for gas, electricity or water for the service to be furnished within the territory and for a period to be fixed by the commission in the order, not exceeding three years, except in the case of a sliding scale, and thereafter until the commission shall, upon its own motion or upon the complaint of any corporation or person interested, fix a higher or lower maximum price of gas, electricity, water or sewer service to be thereafter charged.

4. In determining the price to be charged for gas, electricity, or water the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein, with due regard, among other things, to a reasonable average return upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies. . . .